FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

□

No. 66

WESLEY WILLIAM COX
Petitioner
v.
THE UNITED STATES OF AMERICA

□

No. 67

THEODORE ROMAINE THOMPSON
Petitioner
v.
THE UNITED STATES OF AMERICA

□

No. 68

WILBUR ROISUM
Petitioner
v.
THE UNITED STATES OF AMERICA

□

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT BRIEF FOR PETITIONERS

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Joint Statement

Jurisdiction

This Court has jurisdiction of these cases under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court, May 7, 1934.

Judgments of affirmance were rendered and entered October 4, 1946. (Cox [61-62], Thompson [64-65], Roisum [66-74])[1] The time for filing petition for rehearing was enlarged. (Cox [73], Thompson [65], Roisum [67]) Petition for rehearing was duly filed within the time fixed by the order extending the time. (Cox [63-72], Thompson [65], Roisum [67]) The petition for rehearing was denied March 20, 1947. (Cox [73], Thompson [65], Roisum [67]) The petitions for writs of certiorari were filed April 7, 1947, and the writs were granted June 9, 1947. (Cox [75], Thompson [67], Roisum [69]) (67 S. Ct. 1532)

Opinion Below

The opinion of the United States Circuit Court of Appeals reversing the judgments in these cases on April 5, 1946, is not reported. The opinion does not appear in the records, but appears as Appendix to the petitions for writs of certiorari in each of these cases. The opinion was withdrawn by an order of the court dated September 27, 1946. (Cox [54], Thompson [57-58], Roisum [59-60])

The opinion of the court below affirming the judgments of conviction is reported at 157 F. 2d 787. It appears in the record. (Cox [56-61], Thompson [59-64], Roisum [62-66])

[1] Bracketed figures appearing herein refer to pages of printed transcript of records.

Statutes and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.3, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

Questions Presented

ONE

Did the court below err in holding that the judgments of conviction should be affirmed because the denial of each petitioner's right to be heard on his attack against the validity of the draft board proceedings was immaterial and harmless error in that there was basis in fact for the classification given by the draft boards?

TWO

Did the court below err in failing to hold that the undisputed evidence in these cases showed that the denial of each petitioner's claim for exemption from training and service as a minister of religion was without basis in fact and in excess of the jurisdiction of the draft boards?

THREE

Did the court below err in holding that the trial courts could not consider *de novo* evidence in determining whether the draft boards exceeded their jurisdiction in denying each petitioner's claim for exemption as a minister of religion?

Facts Common to All Cases

The facts here stated are taken from the opinion of the court below. These facts were stated by the court below as covering jointly these three cases. Therefore, for an abbreviated presentation of the facts found by the court below the petitioners here adopt the statement of facts appearing in the opinion of the court below.

Each petitioner was classified as a conscientious objector and ordered to a civilian public service camp, there to perform such work of national importance as he should be directed to perform. He reported. Within fifteen or twenty minutes after arriving Cox and Thompson left without permission and intentionally remained away. Petitioner Roisum, after arriving, was given a limited leave of absence and remained away, after his leave had expired. (Cox [57-58], Thompson [60-61], Roisum [62-63])

Each petitioner claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained minister of religion exempted him from any training and service under the Act and from the jurisdiction of a board to issue any order directed to him. Section 5 (d) of the Act (50 U. S. C. App. 305 (d)) acts to exempt "regular and duly ordained ministers of religion" from training and service but not from registration. (Cox [58-59], Thompson [61-62], Roisum [63])

Petitioners' claims as to exemption were at all times consistently, persistently and openly made by each. These claims were the subject of competent proof to the boards through each petitioner's questionnaire, and evidence was presented at board hearings that, although he was conscientiously opposed to war by reason of religious training and belief, he was a minister, and requests were made for classification as such. Notwithstanding all of this, each petitioner says that the boards treated his claim as a mir-

ister arbitrarily and capriciously, and proceeded to classify him as a conscientious objector. (Cox [58-59], Thompson [62], Roisum [64])

At the trial all of the proffered evidence relevant to petitioners' claimed status as ministers of religion was received by the court, but the jury was instructed in each case not to consider it for any purpose. The evidence presented was competent and substantial. The appropriate steps were taken entitling each petitioner to maintain appeals. (Cox [69], Thompson [62], Roisum [64])

Separate Statement of *Cox* Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended. [2] The indictment charges that on May 26, 1944, being an assignee of a civilian public service camp located at Downey, Idaho, petitioner unlawfully did desert, leave and depart from said camp. [2-3] Petitioner pleaded "not guilty". [3] He was tried to a jury before the court on October 24, 1944. [5-28] At the close of the Government's case petitioner moved for a directed verdict. [19] The motion was denied with exception. [19] At the close of all the evidence, petitioner renewed his motion for directed verdict. [39-40] The case was argued to the jury. [24] The court instructed the jury. [24-28] Petitioner duly submitted requested instruction to the court, which was denied with exception. [40] The jury retired and returned its verdict of guilty. [4, 28] By judgment petitioner was committed to the custody of the Attorney General for a period of three years and three months and fined $300.00. [4-5] Petitioner duly served and filed his notice of appeal. [28-30]

He was admitted to bail pending appeal. [30-35] He timely filed his assignments of error. [35-37] Bill of exceptions, preserving the questions presented upon appeal and upon this petition for writ of certiorari, was duly and timely allowed by the trial court. [38-43] In due course the case was, in the court below, argued, submitted, reversed and resubmitted upon the Government's motion for rehearing, resulting in the judgment being later affirmed.

FACTS

Petitioner's selective service file shows that he registered under the Selective Training and Service Act on October 16, 1940, with Local Board No. 2, Jackson County, Oregon. [8] He filed his questionnaire (Pl. Ex. No. 2) [9] on December 3, 1940. [2] He stated that he was 22 years old; that since 1936 he had been employed as a truck driver hauling lumber; and that he was engaged in no other business or work.

On December 4, 1940, the local board classified petitioner in Class I, subject to physical examination, and on January 31, 1941, he was classified IV-F—not physically fit for service. The classification was changed to I-A on March 10, 1942. Ten days later, on March 20, 1942, petitioner for the first time claimed exemption from military service. He filed the form provided for registrants asserting conscientious objections to military service. (Pl. Ex. No. 3). [9]

In this document petitioner stated that he became one of Jehovah's witnesses in January, 1942, and began wit-

nessing from house to house and on street corners; that his occupation was "logging and lumbering".

The local board rejected petitioner's claim to exemption, but on May 25, 1942, he was again classified in IV-F, as one physically unfit for military service. On June 12, 1942, the local board reclassified petitioner in IV-E, as a conscientious objector to military service. In response to this classification, petitioner wrote the local board on June 22, 1942, requesting for the first time that he be classified as a minister of religion. [12] On June 26, 1942, the local board determined that petitioner was properly classified IV-E. On the same date petitioner took an appeal to his board of appeal and on December 7, 1942, the board of appeal also classified him in IV-E.

Petitioner informed the board that on October 16, 1942, he became a "pioneer" minister and undertook to devote 150 hours monthly to his preaching work. An affidavit from another minister was filed stating that petitioner had been associated with Jehovah's witnesses since January, 1942, and that he was serving as a minister. He also filed a statement from the Watchtower Bible and Tract Society to the same effect. [12-15]

Petitioner requested the local board to reconsider the classification, but on December 21, 1942, the board refused to do so. On May 18, 1944, the local board ordered petitioner to report for work of national importance. He reported [10] to the civilian public service camp to which he was assigned "solely for the purpose of completing the administrative process" [18] and he then left the camp. [22]

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of the Government's case [19] and again at the close of all the evidence [39-40] petitioner moved for an instructed verdict and for a judgment of acquittal, on the grounds that the undisputed evidence showed the draft board order to be void. [19, 39-40] Each motion was denied with exception to petitioner. [19, 39-40, 43]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [40] The requested charge was refused, with exception allowed. [40]

The trial court instructed the jury that the only issue to be determined was whether or not petitioner departed and deserted from the camp without proper authority to do so. The jury was instructed that if the evidence established that petitioner left the camp without such authority he would be guilty. [27] The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [27] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [26-27] The trial court specifically instructed the jury as follows:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he

was assigned as set out in the indictment, which has been read to you and which you may take to the jury room.

"If you find that the Government has proved these allegations then you will find the defendant guilty as charged, otherwise you will acquit him.

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67, at Downey, Idaho." [26-27, 40-41]

That the issues properly raised the questions presented upon appeal to the court below and that the questions presented upon this petition for writ of certiorari were properly raised in the trial court, is recognized and declared by the court below in its opinions of April 5, 1946, and October 4, 1946. On April 5, 1946, it said: "At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals. . . .

"It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a

valid defense to the charges for which they were being tried." (See Appendix to petition filed with this Court.)

On October 4, 1946, the court below said: "At the trials all of the proffered evidence to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal." [59]

Separate Statement of *Thompson* Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended. [2] The indictment charges that on April 18, 1944, being an assignee of a civilian public service camp located at Downey, Idaho, petitioner unlawfully did desert, leave and depart from said camp. [2-3] Petitioner pleaded "not guilty". [3] He was tried to a jury before the court on October 24, 1944. [6-33] At the close of the Government's case petitioner moved for a directed verdict. [23] The motion was denied with exception. [24] At the close of all the evidence, petitioner renewed his motion for directed verdict. [28-29] The case was argued to the jury. [28] The court instructed the jury. [29-33] Petitioner duly submitted requested instruction to the court, which was denied with exception. [32-33, 45] The jury retired and returned its verdict of guilty. [4, 33] By judgment petitioner was

committed to the custody of the Attorney General for a period of three years and three months and fined $300.00. [4-5] Petitioner duly served and filed his notice of appeal. [33-34] He was admitted to bail pending appeal. [35-40] He timely filed his assignments of error. [40-42] Bill of exceptions, preserving the questions presented upon appeal and upon this petition for writ of certiorari, was duly and timely allowed by the trial court. [42-48] In due course the case was, in the court below, argued, submitted, reversed and resubmitted upon the Government's motion for rehearing, resulting in the judgment being first reversed and later affirmed.

FACTS

On October 16, 1940, petitioner registered with Local Board No. 1, Jackson County, Oregon (Pl. Ex. No. 1). [9] In his selective service questionnaire (Pl. Ex. No. 2) [10] which was executed May 27, 1941, petitioner stated that he was operating a grocery store and that, in addition, he was and had been a minister of Jehovah's witnesses since August 1, 1940. In the conscientious objector's form (Pl. Ex. No. 3) [10] which he filed at the same time, petitioner stated that he became associated with Jehovah's witnesses in August 1940; that after completing high school in 1928 he worked as a grocery clerk and manager until 1935, as an embalmer in 1935, and as a grocery manager and owner thereafter.

On May 28, 1941, the local board classified petitioner in III-A, a deferred classification because of dependents. When the dependency deferment was no longer available to persons in petitioner's situation he was classified as IV-E, as a conscientious objector to military service.

On November 5, 1943, petitioner appealed to the board of appeal and he adduced additional evidence in support of his claim to exemption. He filed a statement signed by various persons stating that they recognized him as a minister, and an affidavit by Fred Kimmet, minister of Jehovah's witnesses, stating that petitioner's record of "field service" for the year ending September 30, 1943, showed that petitioner devoted 519½ hours in his ministerial work during which time he disposed of 46 bound books, 625 booklets and 673 magazines, and made 105 "back calls" upon persons manifesting interest in the Bible. Similar supporting documents corroborating petitioner's claim were also filed.

On December 29, 1943, the board of appeal by vote of 5 to 0 classified petitioner in IV-E. An order to report for work of national importance was sent to petitioner (Pl. Ex. No. 5) [11] and he complied with it by reporting to the civilian public service camp to which he was assigned. After reporting to the camp, petitioner promptly handed to the camp director a letter stating that he believed himself to be wrongly classified and that he would not remain at the camp [21-22]. Within fifteen or twenty minutes after reporting petitioner left the camp and did not return [27].

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of the Government's case [23] and again at the close of all the evidence [28-29] petitioner moved for an instructed verdict and for a judgment of acquittal, on the grounds that the undisputed evidence showed the draft board order to be void. [23, 28-29] Each motion was denied with exception to petitioner. [24, 28-29]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [32, 33, 45] The requested charge was refused, with exception allowed. [32, 33, 45]

The trial court instructed the jury that the only issue to be determined was whether or not petitioner departed and deserted from the camp without proper authority to do so. The jury was instructed that if the evidence established that petitioner left the camp without such authority he would be guilty. [31-32] The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [31-32] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [31-32] The trial court specifically instructed the jury as follows:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was assigned as set out in the indictment, which has been read to you and which you may take to the jury room.

"If you find that the Government has proved these allegations then you will find the defendant guilty as charged, otherwise you will acquit him.

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67, at Downey, Idaho." [31-32, 45-46]

That the issues properly raised the questions presented upon appeal to the court below and that the questions presented upon this petition for writ of certiorari were properly raised in the trial court, is recognized and declared by the court below in its opinions of April 5, 1946, and October 4, 1946. On April 5, 1946, it said: "At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals. . . .

"It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried." (See Appendix to the petition filed with this Court.)

Separate Statement of *Roisum* Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended. [2] The indictment charges that on May 27, 1944, being an assignee of a civilian public service camp located at Lapine, Oregon, petitioner, after being given a limited leave of absence unlawfully did fail and refuse to return to said camp. [2-3] Petitioner pleaded "not guilty". [4] He was tried to a jury before the court on October 24, 1944. [20-50] The court instructed the jury. [44-45, 47] Petitioner duly submitted requested instruction to the court, which was denied with exception. [45, 50] The jury retired and returned its verdict of guilty. [48-49] Petitioner thereupon filed his motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. [49] Said motion was denied. [51] By judgment petitioner was committed to the custody of the Attorney General for a period of two years. [5-6, 51] Petitioner duly served and filed his notice of appeal. [7-8] He timely filed his assignments of error. [8-9] Bill of exceptions, preserving the questions presented upon appeal and upon this petition for writ of certiorari, was duly and timely allowed by the trial court. [10-16] In due course the case was, in the court below, argued, submitted, reversed and resubmitted upon the Government's motion for rehearing, resulting in the judgment being first reversed and later affirmed.

FACTS

Petitioner registered under the Selective Training and Service Act with Local Board No. 1, Sunnyside, Washington, and in December, 1941, he filed his selective service questionnaire. In that document he stated that he was twenty-two years old; that he had an eighth grade education; that for the past fifteen years he worked as a farmer; that he was ordained as a minister of Jehovah's witnesses in June, 1940; and that he desired classification in IV-D as a minister of religion.

Petitioner also filed a form letter from the Watchtower Bible and Tract Society which stated, *inter alia*, that he had been associated with it since 1936; that he had been baptized in 1940; and that he devoted his "entire time" to his ministerial work. He also submitted an affidavit dated December 15, 1941, signed by his father which stated that petitioner was necessary to the operation of the father's farm.

He filed a conscientious objector's form on June 29, 1942, in which he claimed exemption from combatant and noncombatant military service. In this document he affirmed again that for the past fifteen years he had worked as a farmer. He stated also that he became associated with Jehovah's witnesses in 1930.

Kenneth Hazen, minister in possession of the local records, informed the Selective Service System that the records of petitioner's ministerial activities showed that he worked the following number of hours in the months specified:

Month	Year	Hours
October	1942	28
November	1942	11
December	1942	47
January	1943	60
February	1943	69
March	1943	21[2]

Hazen informed the board that "to my knowledge Wilbur Roisum has also conducted up to five studies a month, necessitating twenty calls a month." According to Hazen, petitioner held office in the local company of Jehovah's witnesses as "Assistant Company Servant", "Back Call Servant" and "Book Study Conductor".

On June 25, 1942, the local board classified petitioner in I-A-O, as a conscientious objector to combatant military service. Petitioner immediately appealed to his board of appeal. A hearing was held before a Department of Justice Hearing Officer, who filed a report recommending that petitioner's claim to exemption as a conscientious objector be sustained. Thereafter, on August 4, 1943, the board of appeal classified petitioner in IV-E, as a conscientious objector to all military service. Petitioner's subsequent request to the State Director that an appeal be taken to the President was rejected.

Petitioner, having been found physically acceptable for service, was ordered to report on May 23, 1944, to the local board for work of national importance. He reported and was transported to a civilian public service camp where he remained for five days. At his request, he was granted a week-end pass to leave camp and he never returned. [35]

[2] Hazen informed the board that petitioner had suffered a leg injury in this month, the inference being that this accounts for the low number of hours worked.

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of all the evidence petitioner moved for a judgment of acquittal notwithstanding the verdict [49] on the grounds that the undisputed evidence showed the draft board order to be void. [49] Motion was denied, with exception to petitioner. [50, 51]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [45, 50] The requested charge was refused, with exception allowed. [45, 50]

The trial court instructed the jury that the only issue to be determined was whether or not petitioner having departed from the camp with permission to leave for one day, remained away continuously. The jury was instructed that if the evidence established such fact, petitioner would be guilty. [44-45] The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [45] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [44-45]

On motion for judgment of acquittal notwithstanding the verdict of the jury or in the alternative for a new trial, petitioner asserted the claim that his classification was the result of "arbitrary, capricious and unlawful conduct" by the classifying board. [12-13] At this juncture, the trial judge examined petitioner's selective service file which was in evidence, and thereafter the motion was denied because the court concluded that the classification was not in issue, material or unlawful. [51]

Specification of Errors

The Circuit Court of Appeals for the Ninth Circuit erred—

ONE

In holding that the ruling of each trial court to the effect that the illegality of the draft board proceedings was not material as a defense and that such ruling was harmless error because the draft board proceedings showed that the classification was not without basis in fact and was within the jurisdiction of the agency.

TWO

In refusing to follow the decisions of this Court in *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, 327 U. S. 114; *Gibson* v. *United States*, 329 U. S. 338; *Dodez* v. *United States*, 329 U. S. 338.

THREE

In holding that there was basis in fact for the classification given petitioners by the draft boards when the undisputed evidence showed each petitioner was exempt from training and service as a minister of religion under Section 5 (d) of the Act.

FOUR

In holding that *de novo* evidence could not be considered by each trial court in determining whether or not the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion under Section 5 (d) of the Act.

FIVE

In affirming the judgments of conviction.

POINTS FOR ARGUMENT

ONE

The conceded errors of the trial courts in their instructions and rulings that the illegality of the draft board proceedings in these cases could not be considered in petitioners' defenses may not be cured by a holding of the circuit court of appeals upon a *de novo* consideration of the draft board records that the orders to report were legal.

TWO

There was no basis in fact for the classifications given petitioners by their draft boards because the undisputed evidence showed that they were exempt from training and service as ministers of religion under Section 5 (d) of the Selective Training and Service Act of 1940.

THREE

***De novo* evidence as to the exempt status of petitioners should have been received and considered by the trial courts in determining whether the draft board orders were in excess of the jurisdiction of the local boards because petitioners were exempt as ministers of religion under Section 5 (d) of the Selective Training and Service Act.**

ARGUMENT

ONE

The conceded errors of the trial courts in their instructions and rulings that the illegality of the draft board proceedings in these cases could not be considered in petitioners' defenses may not be cured by a holding of the circuit court of appeals upon a *de novo* consideration of the draft board records that the orders to report were legal.

The court below held that the judgments should be affirmed because, upon the evidence, it appeared that petitioners were not illegally classified and denied their claims as ministers of religion within the meaning of the Act and therefore the district courts did not commit any prejudicial error against petitioners when the evidence appearing in the draft board files was excluded from consideration by the courts and juries, or when the courts instructed the juries that they could not consider the alleged illegality of the draft boards' determinations. In other words, the court below held that the alleged error in denying petitioners due process of law was harmless because petitioners would not have been able to establish that the draft boards acted illegally, even if the district courts had ruled properly.

This holding begs the question. It puts the cart before the horse. If there was denial of due process of law such denial cannot be cured by the finding of the court below that petitioners were allowed due process of law by the draft boards. Suppose the district courts had denied petitioners the right to counsel. Can it be reasonably said that such denial could be cured by a finding that petitioners had no good defense to the indictments because their draft boards' files showed they were legally classified and therefore guilty of failing to remain at the civilian public service camps? Suppose the district courts would have put them to trial upon

information rather than indictment. Suppose the courts erroneously overruled a plea of former jeopardy. Suppose petitioners were convicted upon confessions illegally obtained, contrary to the Constitution. Can it reasonably be said in any of these instances that the violation of the Constitution is harmless error because the draft boards' files showed petitioners were legally classified and that they were guilty?

The mere asking of the questions answers with a resounding, No!

The final judgments of the court below in all of these cases should be reversed and the causes remanded with directions for a new trial of each of the indictments so that the judgments will conform to and comply with the decisions of this Court in *Estep* v. *United States*, 327 U.S. 114, *Smith* v. *United States*, 327 U.S. 114, *Gibson* v. *United States*, 329 U.S. 338, and *Dodez* v. *United States*, 329 U.S. 338.

In each of these cases just mentioned the facts and circumstances were identical to the facts and circumstances here. The erroneous ruling in each of said cases by the trial court was held by this Court to require a reversal and an order remanding each case to the trial courts for further proceedings.

In its opinion in *Dodez* v. *United States* (329 U.S. 338) this Court said:

"This view requires reversal of the judgment in No. 86 and remanding the cause to the District Court for a further trial. Dodez insists, however, that we should go further and determine the case finally upon the merits. He urges that the evidence properly tendered and admissible upon the excluded defenses, as well as that adduced, would support no other verdict than one of acquittal and that therefore the trial court should have sustained his motion to dismiss the cause. Accordingly he asks for a judgment here directing that such relief be given.

"In the *Estep* and *Smith* cases [327 U.S. 114], after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: 'We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case.' 327 U.S. at 125. Dodez' situation is identical, in this respect, with those of Estep and Smith. Accordingly we remand the cause, as was done in the *Smith* and *Estep* cases, for further proceedings in the trial court, without expressing opinion upon those further issues."

In the *Gibson* case, the Government argued, as its ground for affirmance in that case, the same ground that was urged by the court below in its opinion: "Since in each case under treatment in this opinion the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely." (Cox [60], Thompson [62-63], Roisum [64-65])

In the brief for the United States on reargument in *Gibson* v. *United States*, No. 23, October Term 1946, the Government, *inter alia*, stated: "Even if we are mistaken in our view that the defense of illegal classification is barred by petitioner's acceptance by the Civilian Public Service Camp, we think the judgment of the circuit court of appeals should be affirmed on the ground that the information contained in petitioner's selective service file, which he offered in evidence, plainly shows that there was foundation in the facts before the boards for rejecting petitioner's claim to classification as a minister. . . . we think there was ample basis in fact for the boards' rejection of peti-

tioner's claim." (See pages 7-8, 39-56 of Government's brief.)

The opinion of the court below holding that the action of the trial courts, in refusing to consider or to permit the juries to consider the illegality of the administrative action is harmless error, should not stand. A similar attempt was made by the Fourth Circuit Court of Appeals in *Smith* v. *United States*, 148 F. 2d 288. See the last point discussed in that opinion. The *Smith* case was a companion case to the *Estep* case (327 U.S. 114) in this Court. The Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. This Court did not consider the error harmless, as did the court below, in its affirmance of the judgments here. In the *Smith* case the trial court refused to permit the jury to pass upon the issues raised. In the *Smith* case the trial court limited determination of the issues to whether the defendant complied with the order. In these cases the district courts limited the determination to whether the petitioners complied with the orders to remain at the camps. Moreover, in the *Smith* case, as well as in these cases, the trial court did not pass upon the legality of the administrative determination.

If the court below can pass upon the validity of the administrative determinations after reviewing the draft board files, then the district courts should have done so. Inasmuch as the district courts failed to consider the legality of the administrative determinations, and failed to permit the juries to determine the legality of the administrative actions, the errors, which are denial of due process, cannot be cured by the rationalizing of the court below in these cases. In the same way, the error in the *Smith* case could not be cured by the rationalizing of the court of appeals. *Smith* v. *United States*, 148 F. 2d 288; see last paragraph of opinion. The contrary view taken by this Court is best expressed by the last sentence of its opinion in the *Estep* and

Smith cases (327 U.S. 114): "Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

If this Court was of the opinion that the performance of secular work by a minister of religion, or the failure of a minister to devote his full time (to the exclusion of all other activity) in the furtherance of ministerial work, would be ground for holding as harmless error the action of the trial court in excluding evidence and in holding that the jury could not consider the alleged illegality of the draft board action it would have so held in the *Smith* case. It seems plain that if one is denied the right to make his defense that the action of the draft boards was illegal, such cannot be held harmless error because the appellate court is of the opinion that the draft boards did not err in making the classifications. If such can be accomplished, then the denial of the right of trial by jury can be held to be harmless error on the ground that the undisputed evidence shows that the defendant is guilty. The effort of the court below to hold as harmless error the denial of due process by the district courts is an effort to use appeal as a trial *de novo* of the guilt or innocence of petitioners.

Only one court has jurisdiction to determine the guilt or innocence of petitioners under the indictments, and that is the district court in each case. The failure of the district courts to exercise judicial function did not authorize the circuit court of appeals to reconsider the evidence *de novo* to determine whether or not petitioners were guilty. The district courts having failed to exercise their function in this regard cannot be exonerated from the violations of the Constitution because the court of appeals saw fit to allow petitioners a full and fair trial on the alleged illegality of the administrative determination after their convictions. They were entitled to this consideration before conviction.

The holding of the court below that, although the de-

fense was available, the petitioners' convictions should be affirmed because the draft board proceedings in each case were found to be valid, is an extraordinary departure from due process of law in appeal of criminal cases. The judgments of conviction are invalid because of the denial of the right to be heard *in the district courts* on the validity of the draft boards' determinations. The denial of this right entitled petitioners to reversals and new trials. The invalidity of the judgments because of the denial of the right, cannot be validated by the court's inquiring into the validity of the draft board proceedings in each case. Once the judgments are invalid the validity cannot be restored by the court's performing the judicial functions that the district courts refused to perform.

The defense of whether or not petitioners were ministers of religion should have been submitted to the jury for determination. In a criminal prosecution it is beyond the power of the district court or the circuit court of appeals to hold that a defendant does not have a right to have the issue of his guilt submitted to the jury. If the undisputed evidence did not show that he was not guilty, then there was an issue for the jury as to guilt. The failure of the trial court and of the circuit court of appeals to hold that petitioners were entitled to have this issue submitted to the jury violated their constitutional right of trial by jury. *United States* v. *Taylor*, 11 F. 470, 471; *Cain* v. *United States*, 19 F. 2d 472; *Blair* v. *United States*, 241 F. 217, *cert. denied* 244 U.S. 655; *United States* v. *Stevenson*, 215 U.S. 190, 199; *Patton* v. *United States*, 281 U.S. 276.

The secular work of the petitioners, while regularly pursuing ministerial activities, does not, as a matter of law withdraw from the consideration of the jury whether or not they were exempt as ministers of religion. "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister."—*Trainin* v. *Cain* (CCA-2) 144 F. 2d 944. See also Ex parte *Stewart* (DC-Calif.) 47 F. Supp. 415, 420.

In the case of *Smith* v. *United States* (CCA-4) 157 F. 2d 176, and also in the case of *United States* v. *Zieber* (CCA-3) 160 F. 2d 90, the courts held that whether there was a violation of procedural due process was a question of fact rather than one of law.

In Ex parte *Cain*, 39 Ala. 440-441, *Offord* v. *Hiscock*, 86 L. J. K. B. 941, and *Bien* v. *Cooke* (1944) 1 W. W. R. 237, each of the persons claiming exemption from military training and service was employed in secular work during the week and preached once a week as a minister of religion on Sundays. Each of those decisions held that particular determinations by the administrative tribunals were arbitrary, capricious and illegal because denying the claim for exemption on the ground that they were engaged in secular work. Regardless of whether this Court holds as a matter of law that one is a minister who performs secular work during the week engages in ministerial work regularly on Sundays and at other times during each week, the Court cannot hold as a matter of law in the face of these decisions

and the liberal interpretation placed upon the Act that one who does perform secular work to sustain himself in the ministry is not a minister of religion within the meaning of the Act. This being true, it is an issue for the jury or at least for the trial court. The trial courts did not perform their judicial function on the question. The petitioners did not have judicial trials before the trial judges on the issue of whether or not they were exempt. Indeed the trial courts excluded all the evidence and refused to pass on the question. It is improper for an appellate court to approve such illegal procedure on the part of the trial court because the appellate court is of the opinion that the draft board was not arbitrary and capricious in making its determination. It was the duty of the trial courts to first pass on this question in order that it could be properly reviewed in the appellate court. Not having been passed on either by the trial courts or the juries it is fundamental and reversible error to withhold the issue from the jury regardless of what the circuit court of appeals thought about the matter of the merit of petitioners' claim for exemption.

Since petitioners were denied due process of law, as they claim, then there is only one method whereby that denial can be cured. That is to remand their cases to the trial courts for new trials, so that upon retrials they will have opportunity to make their defenses. If one is denied the right of counsel, the right of trial by jury, or the right to trial under indictment contrary to the Constitution, such errors cannot be cured on the ground that they were harmless errors or that the petitioners are admittedly guilty, as the court below held here.

TWO

There was no basis in fact for the classifications given petitioners by their draft boards because the undisputed evidence showed that they were exempt from training and service as ministers of religion under Section 5 (d) of the Selective Training and Service Act of 1940.

This matter has been extensively briefed and argued before this Court in previous cases. The argument made in those cases is relevant here. It is far more extensive than will be made here because petitioners are of the opinion that the issues presented under this point will not be reached if the Court accepts the contentions which petitioners have made under Point One.

However, as a precautionary measure and to answer the anticipated argument that will be made by the Government in these cases, which was advanced in the court below, petitioners will briefly discuss the point here raised. In the event this discussion is not sufficient to satisfy the Court in support of the point then, before accepting the argument of the Government, the Court is respectfully referred to the argument appearing at pages 83-131 of the Joint Brief for Respondent Kulick and Petitioner Sunal in Nos. 840 and 535, October Term, 1946, and the argument appearing at pages 105-190 of the Joint Brief for Petitioners filed in *Smith* v. *United States,* No. 66, October Term, 1945, and *Estep* v. *United States,* No. 292, October Term, 1945.

The holding of the draft boards is in direct conflict with the holding of the Seventh Circuit Court of Appeals in *Hull* v. *Stalter,* 151 F. 2d 633.

Moreover, the draft boards' holding is out of harmony with the dictum expressed on the same question by other circuit courts in *Lehr* v. *United States* (CCA-5) 139 F. 2d 919, 921-922, and *Trainin* v. *Cain* (CCA-2) 144 F. 2d 944, 949.

Also, the draft boards' holding, in effect, that activity of petitioners was nothing more than that of a lay worker of a religious organization and was not preaching as a minister, is directly in conflict with decisions in *Murdock* v. *Pennsylvania* (1943) 319 U.S. 105, 106-109, 110, 111, 117, and *Follett* v. *McCormick*, 321 U.S. 573, where facts in reference to the ministerial activity were identical with facts here. In those decisions it was held that the activity of Jehovah's witnesses occupied the same high estate as do orthodox preaching from the pulpit. Furthermore, it was held that the preaching activity of Jehovah's witnesses was more than preaching. It was a combination of pulpit preaching and evangelism.

Additionally, the draft boards' decision interpreting the Act and Regulations is in direct conflict with the administrative interpretation placed upon the Act and Regulations by the National Headquarters of Selective Service System in State Director Advice 213-B.[3] The National Headquarters says that "the *regular* discharge of his duties as a minister is a most important factor in determining whether a registrant should be classified" as a minister of religion. (Emphasis added)

The draft boards in construing the Act and Regulations contradict that statement of advice by National Headquarters.

Again the National Headquarters says that the "historic nature of the ministerial function of a registrant's *own religious organization must be taken into consideration in each individual case.*" (Emphasis added)

That statement of advice by National Headquarters also is contradicted by the draft boards in construing the Act and Regulations.

[3] The Court can judicially notice the administrative opinions and interpretations of the Act and Regulations. Bowles v. United States, 319 U.S. 33, 35.

Still more, National Headquarters holds that performance of secular work does not deprive a minister of his right to exemption, by saying, "In some churches both practice and necessity require the minister to support himself, either partially or wholly, by secular work."

The draft boards in construing the Act and Regulations contradict also that statement of advice by National Headquarters.

And finally, National Headquarters of the Selective Service System specifically advises all draft boards that whether one of Jehovah's witnesses is to be classified as exempt "must be determined *in each individual case* based upon whether he *devotes his life* in the furtherance of the beliefs of Jehovah's witnesses, whether he *performs functions which are normally performed* by regular or duly ordained ministers of other religions, and finally, *whether he is regarded by other* [of] *Jehovah's witnesses in the same manner in which regular duly ordained ministers of other religions are ordinarily regarded.*" (Emphasis added)

That statement of advice by National Headquarters likewise is contradicted by the draft boards in construing the Act and Regulations.

A broad and liberal interpretation should be placed upon the Act by the Court. It should be held that Congress intended to extend the provisions of the exemption not only to the orthodox denominations but to the dissentient and unpopular groups as well. Certainly Congress did not intend to restrict the protecting shield of the exemption to any particular denomination or creed. Congress intended that ministers of all religious denominations and groups should share the benefit of the exemption, in the same way as did the authors of the Constitution intend to bring within the protecting shield of the First Amendment the ministers of unpopular and dissentient groups as well as those of the popular and more orthodox denominations. *Cantwell*

v. *Connecticut*, 310 U.S. 296; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Martin* v. *Struthers*, 319 U.S. 141.

Uniformly this Court has held that a broad and liberal interpretation should be placed upon the provisions of the various statutes exempting from taxation the property of religious organizations. *Trinidad* v. *Sagrada Orden* etc., 263 U.S. 578; *Helvering* v. *Bliss*, 293 U.S. 144.[4]

Preaching activities of ministers of religion bear burdens that would ordinarily fall directly upon the government. Were it not for the eleemosynary work the general public would be required to establish welfare institutions and kindred agencies and services. Thus the government would be required to impose additional taxes and make a heavier demand upon the manpower of the nation. The Christian preaching of the gospel enjoins upon the people of good will an obligation to conduct themselves uprightly and to be obedient to all proper laws. The contribution to the government through the benefits received by the people from the preaching activity of ministers of religion cannot be equaled by the government if it were to undertake such activity. The charitable work of ministers of the gospel "constitutes not only the 'cheap defense of nations' but furnishes a sure basis on which the fabric of civil society can rest, and without which it could not endure." *Trustees of First M. E. Church South* v. *Atlanta*, 76 Ga. 181, 192; *M. E. Church South* v. *Hinton*, 92 Tenn. 188, 190, 21 S. W. 321, 322; *People* v. *Barber*, 42 Hun (N.Y.) 27; *Comm'th* v. *Y.M.C.A.*, 116 Ky. 711, 76 S.W. 522.

These same arguments as grounds for exemption of the minister of religion from all training and service in the armed forces were duly considered by the House Committee

[4] Trustees of Griswold College v. State, 46 Iowa 275; Watterson v. Halliday, 77 Ohio St. 150, 82 N. E. 962; Mattern v. Canevin, 213 Pa. 588, 63 A. 131; Congregational Society of Town of Poultney v. Ashley, 10 Vt. 241, 244. Cf. Sharraai Berocho v. New York, 60 N.Y. Super. Ct. 479, 18 N.Y.S. 792.

on Military Affairs at hearings had upon the Burke-Wadsworth bill, H. R. 10132. (Hearing before the Committee on Military Affairs, House of Representatives, 76th Congress, 3rd Session, July 30, 1940, pp. 299-305, 628-630) When the bill was before Congress, for consideration before passage, members of Congress declared that the exemption was for the purpose of maintaining the institutions of religions during the war and to insure the performance of and to guarantee that the people would receive religious training and guidance during the war. 55 Cong. Rec. pp. 936, 1473, 1527.

The Director of Selective Service has said that in Congress there was "a natural repugnance toward any proposals for drafting ministers of religion for training and Service." *Selective Service in Wartime,* Second Report of Director of Selective Service 1941-42 (Government Printing Office, Washington) p. 239.

In speaking of this exemption in *Trainin* v. *Cain* (CCA-2, 1944) 144 F. 2d 944, it was said that ministers were exempt in order to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction."

In order to give the Act and Regulations the broad interpretation contended for here, it is not necessary for the Court to strain the language of the Act and Regulations. Indeed, all that has to be done is to put a reasonable interpretation upon the language of the Act and Regulations in the light of history. The Act provides: "Regular or duly ordained ministers of religion and students who are preparing for the ministry . . . shall be exempt from training and service (but not from registration) under this Act." (Selective Training and Service Act, 54 Stat. 887, 50 U.S.C. App. § 305 (d)) The Regulations define a *regular minister of religion* to be "a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he

is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister." (Reg. 622.44 (b))

"A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties." (Reg. 622.44 (c))

These definitions do not say that the minister must be a member of an orthodox denomination. They do not exclude from their provisions any member of any dissentient organization.

The term "regular minister" is used in the Regulations. The term "regular minister" has been defined to be one who regularly teaches and preaches. It has been held that the fact that a minister of religion may be performing secular work during the week to support himself and rendering his ministerial services gratuitously did not prevent him from being a regular minister of religion, because he preached regularly each week, and was therefore a regular minister of religion. Ex parte *Cain*, 39 Ala. 440-441.

It is to be observed that the Regulations use the word "customarily". *Customary*, the word from which it is derived, is synonymous with "usual" and "habitual". It does not mean *continuously*. It is not synonymous with *continuously, uninterruptedly, daily, hourly, or momentarily*. The Century Dictionary defines "customarily" to mean "in a customary manner; commonly; habitually." Therefore the use of the words "regular" and "customarily" implies that Congress intended to give the term "minister of religion" the same broad scope which it has included throughout the history of freedom of worship in this country.

From time immemorial the work of a preacher or minister has not been confined to speaking from a pulpit

to a congregation that is capable of supporting the minister financially so as to make it unnecessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, have been forced to work on farms, in grocery stores, and at other secular work during six days of the week in order to support themselves and their families, so that they might regularly and customarily preach on Sunday. It is a part of the custom of this country that preaching is done regularly when done on Sunday. As long as a minister preaches regularly on Sunday and at night times during the week he is regularly and customarily preaching. If he regularly and customarily preaches during the week, he is a regular minister of religion under the Act and Regulations. The source of his income is wholly immaterial. Whether his congregation is able to provide him with an income sufficient to maintain himself is immaterial. Whether he is fortunate in being rich and able to maintain himself from stocks, bonds, securities and property investments is not material. Whether the regular minister, like most ministers, is not financially independent, but has to depend on his labors for his support, is also immaterial. Time spent in attending to investments from which an income is derived, or to labor in secular callings, is also immaterial in determining whether or not the minister regularly and customarily teaches and preaches.

When the pioneers came to this country and settled it the ministers came along with them, working during the week and preaching regularly on Sunday. When the early settlers pushed into the midwest and the west and pioneered through to the Pacific coast ministers of religion went along, accompanying them, working in the woods and fields and following various secular occupations on six days of each week and regularly and customarily preaching on Sundays. Indeed, even today, in the small towns throughout the nation and in the rural areas are to be found thousands upon thou-

sands of ministers of various religious denominations who work at secular work during the week to support themselves and who on Sunday regularly and customarily preach as do clergymen of the more wealthy congregations in the cities. True, there are scores of thousands of more ministers in the towns and cities, especially the large cities, who have been called by congregations sufficiently large and wealthy to provide them with an income that relieves them of the need to labor during the week. Surely Congress did not mean to say, when it wrote the exemption into the Act, that it was to be extended only to such clergymen of the wealthy congregations able to support their respective ministers so that they would not be required to work at any secular avocation.

It should be remembered that Christ Jesus' apostle Paul, the foremost spokesman of the early Christian church, worked regularly at making tents. He chose to support himself by secular work rather than to be a charge and burden upon the poor people to whom he ministered publicly and from house to house.[5]

[5] "Paul departed . . . to Corinth; and found a certain Jew named Aquila, . . . with his wife Priscilla . . . and came unto them. And because he was of the same craft, he abode with them, and wrought: for by their occupation they were tentmakers. And he reasoned in the synagogue every sabbath, and persuaded the Jews and the Greeks." (Acts 18:1-4) "Paul . . . sent to Ephesus, and called the elders of the church. And when they were come to him, he said unto them, Ye know . . . how I kept back nothing that was profitable unto you, but have . . . taught you publickly, and from house to house." (Acts 20:16-20) "But we exhort you, brethren, . . . to work with your hands . . . and *be dependent on nobody.*" (1 Thessalonians 4:10-12, *Revised Standard Version* (New York, 1946, Thomas Nelson & Sons); compare Ephesians 4:28, *R.S.V.*) "For you yourselves know how *you ought to imitate us;* we were not idle when we were with you, we did not eat anyone's bread without paying, but *with toil and labor we worked night and day*, that we might not burden any of you. It was not because we have not that right, but *to give you in our conduct an example to imitate.* . . . For we hear that some of you are living in idleness, mere busybodies, not doing any work. Now such persons we command and exhort in the Lord Jesus Christ to do their work in quietness and to *earn their own living.* . . . The Lord be with you all. I, Paul, write this greeting with my own hand." (Emphasis added) 2 Thessalonians 3:7-17, *R.S.V.*

To construe the Act and Regulations so as to *exclude* ministers who are forced, or who, as Paul, deliberately choose, to resort to secular work to sustain themselves in the ministry and thus to enable themselves to minister gratuitously to the poor and needy and themselves "be dependent on nobody", is to impute to Congress the intention of limiting the benefit of the exemption to the big-town and city ministers. So to construe the Act results in the inequality which Congress ever seeks to avoid. So to construe brings only the un-American result of excluding from 'equal protection of the law' those ministers of small towns and rural communities of the country who are either unable or unwilling to enjoy wealth that enables big-town and city ministers to escape the need to labor to support themselves and their dependents. Surely Congress intended to provide the benefits of exemption for ministers of rural and small-town parishes as well as for ministers who chose to answer the call of opulent congregations in 'Big Town' and metropolis. Seen in true perspective, the Act's generous provision for exemption of ministers within the Congressional intent contrasts strikingly with the deficient and inequitable definition of the scope of that provision the court below undertook to carve out of the law in the instant case.

In absence of express provision in the Act and Regulations excluding from the shield of the exemption ministers regularly or customarily preaching who support themselves by their own labor at secular jobs, it must be assumed that Congress intended to include those as well as the ministers able to enjoy benefits of his parishioners' wealth so as to excuse him from need to toil for his own livelihood during the week.[6]

[6] Even the National Headquarters of the Selective Service System recognizes that ministers of many denominations are required to perform secular work in order to sustain themselves while engaged in the ministry. State Director Advice 213-B, Part III, ¶3. [80]

At present there are a large number of clergymen and ministers of Protestant and Jewish denominations who depend for their support upon secular work. In the Northern Baptist Convention 20 percent of all clergymen in rural sections "help earn their keep by work not connected with their churches." (Hartshorne and Froyd, *Theological Education in the Northern Baptist Convention* (1945), Judson Press, Philadelphia, p. 72. In the Southern Baptist Convention the percentage is much higher.

Twenty-four percent of all Protestant clergymen in the United States in 1939 received less than $600 annual salary from their respective churches, of which 14 percent received less than $99 annually. "There is nothing to indicate that those in the lower brackets also had other occupations, although it is a safe guess that many of them did." (Landis, *Yearbook of American Churches* 1945, Federal Council of Churches of Christ in America, Sowers Printing Co., Lebanon, Pa., p. 155; see also United States Bureau of Census, Series P-16, No. 8, 16th Census.)

It is well known that the majority of the ministers of the Society of Friends (Quakers), Church of Jesus Christ of Latter-day Saints (Mormons), Mennonites, and many others are dependent entirely upon secular work for their support, no salary being paid to their ministers as a general rule.[7]

It is to be observed that petitioners actually devoted as much time to preaching and the duties of the ministry as do the clergymen who have congregations wealthy enough to support them without performance of secular work. They spent many hours monthly in house-to-house missionary work, and preaching before the congregation, studies,

[7] "'I am the only person in the church,' [Brigham] Young said to Greeley in 1859, 'who has not a regular calling apart from the church service'; and he added, 'We think a man who cannot make his living aside from the ministry of the church unsuited to that office.'" Linn, *The Story of the Mormons* (1902, The Macmillan Co.) p. 576.

special meetings and performance of congregational duties. The orthodox church-sustained clergy do not spend any more time in their preaching activities, yet they do not sustain themselves by secular work as did petitioners Thompson and Roisum.[8]

Throughout history of religious organizations ministers have been distinguished from church-sustained clergy. Even the self-supporting ministers contributed more than the clergy to the spread of religion along with the pioneers in the days of expansion to the West.

". . . about the anniversary meetings, . . . a brief, summary view. . . . About two hundred of God's ministers were in attendance, all told—for *all* are ministers, servants of the truth, from our standpoint and from the standpoint of God's word; in which all are recognized as *priests*—of the royal priesthood . . . The general sentiment . . . was, that they would be all the more diligent hereafter to pass the pleasant bread of truth to the hungering sheep of the Lord." *Watch Tower,* April 1890, Vol. XI, No. 5, p. 1.

"The church has always been more successful in winning kingdoms for her Christ, when she has adopted just this lay preaching method. . . . The whole church a royal priesthood, and so the whole church a preaching church, that is the New Testament ideal." *Lay Preaching* (Secretary's Annual Report), Hoyt, American Baptist Publication Society, 1869, New York, p. 21.

The only way the preaching job could be successfully done in the pioneer days was said to be "by the preaching and teaching, under Episcopal direction, by laymen deriving their support from their own secular labors." *The Missouri Valley and Lay Preaching,* Wharton, 1859, New York, p. 18.

"Although made the special work of certain representative disciples, it is, in fact, enjoined upon the Church as

[8] Petitioner Cox devoted all his time to the ministry.

a whole, and upon its members in particular, 'as of the ability which God giveth' (1 Pet. 4:10, 11) . . . From these scriptural examples, it is just to infer that lay preaching, in the various forms of teaching, evangelizing, and prophesying, had from the first a double object: 1, to do good to all men; and, 2, to develop and prove the gifts of those who from time to time were called from the ranks of the laity to the more public ministry of the Word. Such, doubtless, continued to be the practice of the Church during the early centuries, and it was only by degrees that it became modified under the hierarchial spirit which became developed at a later period. . . . In the Reformed churches there was a general breaking away from the trammels of ecclesiasticism, together with an energy of purpose which did not scruple to employ any agencies at its command for the dissemination of truth. . . . The first formal and greatly effective organization of lay preaching as a system, and as a recognized branch of Church effort, took place under John Wesley at an early period of that great religious movement known as the revival of the 18th century." *Cyclopedia of Biblical, Theological, and Ecclesiastical Literature*, McClintock and Strong, New York, Harper & Bros., 1880.

The English Court of Appeal held that the conscription law of that country, passed during the first world war, should be given an interpretation so as to include a part-time minister of unorthodox Strict Baptist Church. (*Offord* v. *Hiscock*, 86 L. J. K. B. 941) In that case the person held to be a minister was a solicitor's clerk during six days of the week. He was invited to preach on one occasion and it appeared that he was satisfactory, so he was engaged as the minister. In that case Viscount Reading said: "I have come to the conclusion that there is an absence of any evidence from which the Justices could draw the conclusion that he had not brought himself within the exception to the statute enforcing military service. In my view it is clear

that he had determined to devote himself to the ministry."

Under the Canadian National Selective Service Mobilization Regulations the Supreme Court of Saskatchewan held that a registrant was entitled to exemption from all training and service as a minister of religion. (*Bien* v. *Cooke,* 1944, 1 W. W. R. 237) There the minister spent six days a week farming. No special educational requirements were necessary. All that was required was that he satisfy the general secretary, who was a railroad engineer, that he believed the New Testament, and that he met the necessary moral requirements.

The United States Circuit Court of Appeals for the Second Circuit, in *Trainin* v. *Cain,* 144 F. 2d 944, said that the regular performance of secular employment was not incompatible with the claim for exemption as a regular minister of religion: "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister."

The holding in the *Trainin* case is not apposite here. However, the dictum of the opinion in that case may help this Court to find that petitioners are regular ministers of religion. It should be observed that in the *Trainin* case the Second Circuit Court of Appeals found that the registrant did not regularly perform his functions as a rabbi. Moreover, the court found in the draft board record in that case that Trainin never pressed his claim very strongly. Also the court found that his testimony and proof concerning the regular performance of his functions as a rabbi were thoroughly discredited. No such circumstances exist in the instant cases. Petitioners were not discredited in their testimony. There was no doubt that they performed regularly duties as ministers of religion. There was no question

as to their good faith. There was no evidence offered that they did not perform duties as ministers of religion.

Even assuming, for the purpose of argument only, that petitioners are not, in the opinion of the Court, regular ministers of religion within the meaning of the Act and Regulations, they are, nevertheless, ordained ministers of religion.[9] Under the circumstances that petitioners are ordained and regularly performed their duties as ordained ministers, "a more difficult question" is presented. *Trainin* v. *Cain*, 144 F. 2d 944.

Since neither the Act nor the Regulations exclude dissentient groups, they cannot be construed by the court to exclude unorthodox ministers. It must be assumed that the Act and Regulations were intended to embrace within the exemption the ministers of all denominations, whether popular or unpopular, orthodox or unorthodox. Any other view would require us to impute to Congress the intention of discriminating between religious denominations and ministers according to nebulous or arbitrary standards, with resultant inequitable, crotchety application of the statute as attempted by the court below in the instant cases.

A realistic approach to the construction of an act providing for benefits to religious organizations requires that the federal courts make "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton* v. *Howe*, 31 Beavin 14). The theory of treating all religious organizations on the same basis before the law is well stated in *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which

[9] Selective Training and Service Act, § 5 (d); Selective Service Regulations, § 622.44.

does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided in Section 5 (d) of the Act for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

It has been judicially declared that were "the administration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern* v. *Lutheran Churches,* 1 Sandf. Ch. 439, 507 (N.Y.)) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quakers as all possessing equal rights." (*Donahue* v. *Richards,* 38 Me. 379, 409. Cf. *People* v. *Board of Education,* 245 Ill. 334, 349; *Grimes* v. *Harmon,* 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshipping the Supreme Being." (*State* ex rel. *Freeman v. Scheve,* 65 Neb. 853, 879, 93 N.W. 169) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele,* 2 Bar. 397) "So far as religion is concerned the laissez faire theory of government has been given the

widest possible scope."—*State* ex rel. *Freeman* v. *Scheve*, 65 Neb. 853, 878, 93 N.W. 169.

Neither Shakers nor Universalists will be discriminated against in distributing the avails of land granted by Congress in 1778 for "religious purposes." (*State* v. *Trustees of Township*, 2 Ohio 108; *State* v. *Trustees*, Wright 506 (Ohio).) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker society, whether to his mind their practices smack of fanaticism or not, he has no right to act upon such individual opinion in administering justice. (*People* v. *Pillow*, 3 N.Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence* v. *Fletcher*, 49 Mass. 153; *Gass* v. *Wilhite*, 32 Ky. (2 Dana) 170) In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine was contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison* v. *Brophy*, 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church* v. *Remington*, 1 Watts 219, 225; 26 Am. Dec. 61 (Pa.); *Andrew* v. *New York Bible and Prayer Book Society*, 6 N.Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law of the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law.—*Waite* v. *Merrill*, 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238, 245.

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been

directed, as they are now, at politically helpless minorities." —*Minersville v. Gobitis,* 310 U.S. 586.

In the case of Ex parte *Cain,* 39 Ala. 440, in determining whether or not the part-time minister attempted to be drafted under the conscription act of the Confederacy during the Civil War was entitled to exemption, the Alabama Supreme Court aptly states the limitation of the judiciary in passing upon matters spiritual in so far as they pertain to the activity of a minister claiming exemption, saying: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously."

In the decision styled In re *Reinhart* (9 Ohio Dec. 441, 445) the court said: "The moment an attempt is made to limit or restrict ordination to some special form of ceremony we begin to discriminate between the diverse modes and forms of ordination practiced by the various religious societies. The laws of Ohio make no discrimination in any respect between Catholic or Protestant, Greek, Gentile, Jewish, or any other religious societies or denominations, much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as 'the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially in the Roman Catholic, Anglican and Greek churches; consecration to the ministry by the laying on of hands of a bishop or bishops; in other churches, consecration by a presbytery, synod, or council of ministers.'"

The intent to give the Regulations a broad, liberal interpretation as to what constitutes a minister of religion is proved in the fact that the terms of the Act and Regulations have been extended to include within the exemption provision "Lay Brothers" of the Holy Roman Catholic Church.

(State Director Advice 213-B, Part IV, subd. 2.) It should be observed that the "Lay Brothers" are not, in the strict sacerdotal sense, ministers of religion, as declared by the Director of Selective Service, who concerning the broad interpretation to be placed upon the Act said: "Freedom to worship is one of the four freedoms for which we fight. Even in days before we realized that our civilization was to be challenged, even to its religious roots, it was felt that regular and duly ordained ministers should be exempted from military duty. . . . The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves exclusively to religious teaching; Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's witnesses, who sell their religious books, and thus extend the Word. It includes *lay brothers* in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion."[10] (Emphasis added)

"Lay Brothers" of the Holy Roman Catholic Church are not priests, nor in line for the priesthood, of the Roman Catholic Hierarchy. "We may distinguish two types of Brothers; viz.: those who directly serve the people at large for example by teaching, and those who do so indirectly, namely, by directly serving priests or other religious who in turn serve the people directly. . . . Let us consider the offices performed by the second group a little more closely. These men do the manual work necessary in religious communities and institutions. Their ministrations, given freely, are absolutely necessary, if the priests are to be free to attend to their special work. Hence, the argu-

[10] *Selective Service in Wartime*, Second Report of the Directory of Selective Service, 1941-42 (Government Printing Office, Washington) pages 239-241.

ments which prove the need of clergy prove likewise the need of these . . . very important members of religious communities. They also ought, therefore, to be exempted." [11] Menial work and entire absence of the doing by them of any strictly ecclesiastical duties constitute the whole functional status of one very important of two types of "Lay Brothers". They do not conduct religious services of any kind and many are declared to be uneducated and "unable to attain the degree of learning requisite for Holy orders" but "able to contribute by their toil" and "able to perform domestic services or to follow agricultural pursuits". [12]

The Government urges upon this Court that Jehovah's witnesses make no distinction between "shepherd and flock". This is error and contrary to the facts. Jehovah's witnesses make a distinction between "shepherd and flock". Jehovah's witnesses consider that they are the "shepherds" because they preach to and teach the people as ministers of Almighty God, Jehovah, under His appointed Good Shepherd, Christ Jesus. This they do from door to door and publickly, as did Christ Jesus, His apostles, the disciples, and the thousands of Christian ministers who were associated with them in the various congregations at Jerusalem, Antioch, Alexandria, Corinth, Rome, and elsewhere. The "flock" served by Jehovah's witnesses is to be found in the homes

[11] Kennedy (Congressman Martin J.) letter to House Military Affairs Committee, August 7, 1940, *Hearings*, etc., 76th Cong., 3d Sess., on H. R. 10132, pp. 628-630.

[12] *The Catholic Encyclopedia* (1907, Robert Appleton & Co., N.Y.) Vol. 9, p. 93. "Lay Brothers" who do not preach from the pulpit, and who do not minister the sacraments or otherwise function as do the ordained Catholic clergy, number at present, in the United States, more than 10,000. (Official Catholic Directory 1946, New York, P. J. Kenedy & Sons) That, it is to be observed, is more than twice the entire number of some 4,000 of Jehovah's witnesses who have been illegally classified and committed to prison under the Act because certain draft boards did not regard them as having, under the law, a standing equivalent to that of Roman Catholic priests and the clergymen of other popular orthodox denominations.

of the people, where Jehovah's witnesses conduct Bible studies, servicing millions of persons annually.[13]

Moreover, there are 70,000,000 people in this country who do not belong to any church, as well as many other millions belonging to a church who do not attend. These millions need to be served by missionary evangelists. Jehovah's witnesses have answered the need by calling upon the people as missionaries from house to house.

In performing their missionary work, Jehovah's witnesses act as ministers, going to the congregation. They, unlike orthodox clergymen, do not require the congregation to come to them. Jehovah's witnesses act as servants to the people, as did the Lord Christ Jesus, who was a humble servant of the people of good will whom He met in His door-to-door missionary work.[14]

Each one of Jehovah's witnesses must preach in order to be one of Jehovah's witnesses. One who does not preach is not one of Jehovah's witnesses. Jehovah's witnesses are a society of missionary evangelists, engaged in missionary preaching work of the highest type, at home as well as abroad, and throughout the whole world.

It is not unusual to hear of a congress of ministers. The Jesuit organization (Society of Jesus) that functions in connection with the Roman Catholic Hierarchy is, for example, a society of ministers. Various foreign-missionary societies of the popular orthodox religious denominations are composed exclusively of ministers, ordained and un-

[13] See 1946 *Yearbook of Jehovah's Witnesses* (New York, Watch Tower Bible and Tract Society), pp. 43-45.

[14] "Whether is greater, he that sitteth at meat, or he that serveth? is not he that sitteth at meat? but I am among you as he that serveth." —CHRIST JESUS, at Luke 22:27.

"Behold, I stand at the door, and knock: if any man hear my voice, and open the door, I will come in to him, and will sup with him, and he with me."—CHRIST JESUS, at Revelation 3:20.

ordained, who preach the religions of the respective denominations only in foreign countries from door to door and house to house in the same way as do Jehovah's witnesses in the United States and in all other countries.

Therefore it is highly improper and inappropiate to compare a congregation of Jehovah's witnesses with a congregation of Baptists or other Protestant laymen-religionists, or Jews, in the orthodox sense. Of course, in those orthodox religious congregations of laymen only one or two persons minister (as recognized ministers) to the entire congregation. Such ministering consists of preaching done from a pulpit to the assembled laymen-congregants. Those preached to come to the preacher to hear him. The preacher does not go to the people at their homes as do Jehovah's witnesses. Members of congregations of orthodox clergymen do not preach as do Jehovah's witnesses. Such members or congregants are only preached to. Among Jehovah's witnesses each one of Jehovah's witnesses is a preacher and preaches regularly to hundreds, if not thousands, of others each year. Hence, to compare a congregation of laymen, served by an orthodox religious clergyman, to an assembly of missionary evangelists (Jehovah's witnesses), and by rule of thumb to say that such assembly of missionary evangelists is not a group of ministers simply because the congregation of laymen is not a group of ministers, is syllogistic and logistical legerdemain which discriminates and destroys entirely the intent of Congress in providing exemption for ministers of all denominations regardless of whether they were able to come to them or had to go to the congregation; and regardless of whether they were wealthy enough to preach without choosing or being forced to resort to secular work to support themselves in their ministry.

In concluding the argument under this point it is fitting to quote from *Hull* v. *Stalter* (CCA-7) 151 F 2d 633, where *inter alia* it was said:

"Much is said in the briefs both complimentary and derogatory to Jehovah's witnesses. With this argument we are not concerned. Whatever a draft board or a court, or anybody else for that matter, may think of them is of little consequence. The fact is, they have been recognized by the Selective Service System as a religious organization and are entitled to the same treatment as the members of any other religious organization. . . . In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification.

"Selective Service Regulations (622.44) recognizes two classes of ministers, (1) a regular minister of religion, and (2) a duly ordained minister of religion. The former 'is a man who customarily preaches and teaches the principles of religion of a recognized charge [*sic*, properly 'church'], religious sect, or religious organization of which he is a member . . . ' The latter 'is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church . . . ' The Selective Service System has even more broadly defined the term 'regular minister of religion.' Under the heading, 'Special Problems of Classification' (*Selective Service in Wartime*, Second Report of the Director of Selective Service, 1941-42, pages 239-241), it is stated:

"'The ordinary concept of "preaching and teaching" is that it must be oral and from the pulpit or platform. Such

is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message "from housetops" or write it "upon tablets of stone". He may give his "sermon on the mount", heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. . . . He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. . . . To be a "regular minister" of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant.' . . . There is not a scintilla of proof which impugns his honesty, good faith or devotion to the cause. Respondent makes no criticism of relator [Hull] in this respect. Neither has the Selective Service System of Ohio done so insofar as relator is individually concerned. Such criticism as is disclosed by the record was directed entirely at Jehovah's witnesses as a class." *Hull* v. *Stalter* (CCA-7) 151 F. 2d 633.

THREE

De novo evidence as to the exempt status of petitioners should have been received and considered by the trial courts in determining whether the draft board orders were in excess of the jurisdiction of the local boards because petitioners were exempt as ministers of religion under Section 5 (d) of the Selective Training and Service Act.

The ruling of the court below, that the *de novo* evidence could not be received in the trial court for the purpose of determining the want of jurisdiction of the draft boards, is out of harmony with the applicable decisions of this Court.[15]

That it is beyond the authority of a draft board to order a minister of religion to report for induction contrary to the statute is plain. If one is exempt there is a complete absence of jurisdictional facts upon which to act against the individual. All that Congress required a minister of religion to do is to register his name, address, and occupation. No further duty is required of him, and the board is precluded from taking any further action against the minister. If a board wrongfully or mistakenly orders a minister to report for induction, the order is void because Congress divested the board of jurisdiction to do so. The illegal action of the board in disregarding the exempt status of the minister does not alter his status or make him liable for training and service under the Act.

Therefore, a minister exempt from duty may defend against an indictment for failing to respond to an order to report on the grounds that the classification given, the refusal to grant the exemption and the order to report for induction are void because in excess of authority of the board, or beyond the jurisdiction of the board.

[15] But see the decision of the Fourth Circuit Court in Smith v. United States, 157 F. 2d 176.

The trial court can make an independent inquiry as to the action of the board in drafting a minister of religion, and in deciding the questions is not bound by the findings or determinations of the administrative agency, because each of the questions involved is judicial in its nature and such are not administrative discretionary matters. On this issue each petitioner is entitled to a trial *de novo* before the district court, having the right to offer oral testimony.

The *discretionary* decision of draft boards in reference to classifications of persons under a duty for training and service pursuant to the Act and Regulations are, under decisions of this Court on administrative law, final unless unsupported by substantial evidence, arbitrary and capricious or made in violation of procedural due process. However, this rule does not cover the action of the boards in reference to classifications contemplated by the statute entirely exempting and removing registrants from duty under the Act. In such cases the boards are responsible to the United States courts for a proper adherence to the statute, as much as to the classification to be given designated groups as to their personal arrangements. The distinction is well stated in *Crowell* v. *Benson*, 285 U.S. 22, 63, by Chief Justice Hughes: "The question in the instant case is not whether the Deputy Commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable." Accordingly, in *Wise* v. *Withers*, 3 Cranch 331, this Court has held that if one is of that class exempted by Congress from military duty the statute commanding duty for training and service is not applicable to the exempt person and the administrative agency has no jurisdiction.

"A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Crowell* v. *Benson*, 285 U.S. 22, 54.

In cases concerning validity of administrative orders deporting aliens, this Court has repeatedly held that such agencies have no authority to deport a citizen and that the making of the claim of citizenship supported by substantial evidence thereof constitutes a denial of jurisdiction and the finding of the agency on such 'jurisdictional fact' is not binding on the court and can be determined in a judicial trial *de novo*. In an action brought under Section 9 of the Immigration Act to recover penalties (analogous to the criminal action here), this Court said: "The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority." *Lloyd Sabaudo* etc. v. *Etling*, 287 U.S. 329. The same rule was followed in the earlier case of *Gonzales* v. *Williams*, 192 U.S. 1, 15.

In *Kessler* v. *Strecker*, 307 U.S. 22, 34-35, it was declared: "The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of jurisdiction conferred upon the Secretary." Mr. Justice Brandeis, in *Ng Fung Ho* v. *White*, 259 U.S. 276, at page 284, said: "The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service."

The court ruled in the military cases that when enlistment is denied such is a denial of jurisdiction and is a jurisdictional fact for determination by the court *de novo* without limitation by the determination made by the military agency. Likewise denial of induction authority by claiming exemption raises a question of authority of the board to act and is a jurisdictional fact to be determined by the court. *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, 882; *Givings* v. *Zerbst*,

255 U.S. 11, 20; In re *Grimley*, 137 U.S. 147. The rule was restated by Chief Justice Hughes in *Crowell* v. *Benson*, 285 U.S. 22, 58.

In workmen's compensation cases there are certain facts which must exist before the operation of the statutory scheme can begin. As to such 'jurisdictional facts' the final arbiter is the court, not the agency. *Crowell* v. *Benson*, 285 U.S. 22. So also is the rule in *abandonment of line* cases concerning Interstate Commerce Commission determinations, such as whether trackage is "spur" or "industrial". In *United States* v. *Idaho*, 298 U.S. 105, 109-110, the Court said:

"Appellants object that since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Gegg Bros.* v. *United States*, 280 U.S. 420, 444. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court; not to the final determination of either the federal or a state commission." This particular quotation should show conclusively the error of the court below in approving the action of the district court of excluding all the evidence offered *de novo* by petitioners to show proof of their ministry and exempt status under the Act. On January 3, 1944, this Court approved the *Idaho* case, saying, *inter alia:* "Congress has not left that question exclusively to administrative determination; it has given the courts the final say." *City of Yonkers* v. *United States*, 320 U.S. 685, 689.

Conclusion

The judgments of the court below should be reversed and the causes remanded to the trial courts for new trials consistent with the opinion that may be written herein.

Respectfully submitted,

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